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IN THE

Supreme Court of The United States

No. 297

RICHARD H. M. SWANN,
Appellant,

vs.

TOM ADAMS, Secretary of State of the State of Florida; CLAUDE R. BROWN, Supervisor of Registration of Dade County, Florida; E. L. GATES, Supervisor of Registration of Broward County, Florida; and W. B. FREEMAN, Supervisor of Registration of Monroe County, Florida,
Appellees.

On Appeal From the United States District Court In and For the Southern District of Florida

JURISDICTIONAL STATEMENT

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Appellees.

On Appeal From the United States District Court
In and For the Southern District of Florida

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the Southern District of Florida entered on February 7, 1963, and from an order denying motion for new trial entered March 8, 1963. The judgment and order dismissed a suit brought by appellant to have certain statutes enacted by the Legislature of the State of Florida declared unconstitutional as violative of Section 1 of the Fourteenth Amendment of the United States Constitution and to enjoin enforcement of those enactments. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the District Court for the Southern District of Florida is reported as *Sobel v. Adams,* 214 F. Supp. 811 (S.D., Fla. 1963). Earlier opinions in the same proceeding are reported as *Sobel v. Adams,* 208 F. Supp. 316 (S.D., Fla. 1962). Copies of these opinions are printed herein as Appendix A.

Jurisdiction

This appeal is the outgrowth of two separate suits, later consolidated, initially brought pursuant to Title 42, Sections 1983 and 1988 and Title 28, Section 2202, United States Code, by qualified Florida voters to have declared unconstitutional and to enjoin enforcement of Article VII, Sections 2 and 3, of the Constitution of the State of Florida; and of Sections 10.01 and 10.03, Chapter 10, Florida Statutes, 1961; and of pending legislation amending Sections 10.01 and 10.03 known as Chapter 6-61, Laws of Florida, 1961; and, subsequently, of enactments of the Florida Legislature adopted February 1, 1963 and known as Senate Bill 10-X (63) and House Joint Resolution 5-X (63). The jurisdiction of the District Court was predicated upon Title 28, United States Code, Sections 2281, *et seq.* Appeal is from the final judgment of the District Court, entered February 7, 1963, and from the Court's order of March 8, 1963 denying motion for new trial. Notice of Appeal was filed in the District Court on April 5, 1963. The District Court entered an order on May 13, 1963 extending the time for filing the record, docketing the appeal, and filing and docketing a Jurisdictional Statement to and including July 22, 1963. The jurisdiction of the United States Supreme Court to review the decision is conferred by Title 28, United States Code,

Sections 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review on direct appeal the judgment in this case: *Baker v. Carr,* 369 U. S. 186 (1962); *Colegrove v. Green,* 328 U. S. 549 (1946); *Wood v. Broom,* 287 U. S. 1 (1932).

Questions Presented

1. Do the provisions of Senate Bill 10-X (63) deny to Appellant and those similarly situated equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States?

2. Does the plan of legislative reapportionment discriminate invidiously against Appellant and those similarly situated when:

(a) It fails to give primary consideration to the population factor both on a basis of strict equality and on a basis of approximate equality in the apportionment of representation in the Florida Senate and House of Representatives;

(b) It ignores the factors of growth and change in the population and economy of Florida and creates a crazy quilt pattern of senatorial districts which are without rationality;

(c) It permits 14.5% of the population to elect a majority of the Florida Senate and 27.4% to elect a majority of the Florida House of Representatives?

3. Did the District Court err:

(a) In approving Senate Bill 10-X (63) when that Court previously found legislation invidiously discriminatory which permitted 12.3% of the population to elect a majority of the Florida Senate and 14.7% to elect a majority of the Florida House of Representatives;

(b) When it also found legislation invidiously discriminatory which permitted 12.8% of the population to elect a majority of the Florida Senate and 17.7% to elect a majority of the Florida House of Representatives;

(c) When there is no meaningful difference in the rationality of Senate Bill 10-X (63) and two other legislative plans previously declared invidiously discriminatory by the Court; and

(d) When its approval of Senate Bill 10-X (63) in effect forces the electorate of Florida either to ratify an identical provision [House Joint Resolution 5-X (63)] by constitutional amendment or surrender a Florida constitutional safeguard that legislative apportionment shall be effected every ten years?

Statutes Involved

Directly involved are the provisions of Senate Bill 10-X (63) and House Joint Resolution 5-X (63) enacted by the Legislature of the State of Florida in 1963 and printed herein as Appendices B-1 and B-2 respectively. Also involved are Article VII, Sections 2 and 3 of the Constitution of the State of Florida, printed as Appendix C-1, and its implementing statutes, Sections 10.01 and 10.03, Chapter 10, Florida Statutes, 1961, printed as Appendix C-2; and Senate Joint Resolution No. 216 of 1961, which is printed as Appendix D-1, and a companion measure, Chapter 6 - 61, Laws of Florida, 1961, printed as Appendix D-2. Additionally involved are provisions known as House Joint Resolution 30-X (62), printed as Appendix E-1, and its companion measures, Senate Bill 21-X (62) and House Bill 59-X (62), both of which are printed as Appendix E-2.

Statement

Appellant is a registered voter and taxpayer in Dade County, Florida which is the state's most populous county. He is qualified to vote in primary and general elections for state-wide officials and for representatives from his area to the House and Senate of Florida. Appellees are the Secretary of State of Florida and the Supervisors of Registration of Broward, Dade and Monroe Counties. The latter are sued individually and as a class representing all Supervisors of Registration in Florida. All appellees perform duties in the election processes in Florida.

Shortly after the Supreme Court's decision in *Baker v. Carr,* appellant challenged the laws of Florida relating to legislative apportionment, contending that those laws discriminated invidiously against him and denied the guarantee of the Fourteenth Amendment to equal protection of the laws. At that time apportionment was governed by the provisions of Article VII, Sections 2 and 3 of the Florida Constitution (Appendix C-1) and its implementing statutes, Sections 10.01 and 10.03, Chapter 10, Florida Statutes, 1961 (Appendix C-2). The 1961 Legislature, however, had enacted Senate Joint Resolution No. 216 (Appendix D-1) which was a measure to amend Article VII, Sections 2 and 3, of the Florida Constitution. This provision was awaiting ratification by the people at the General Elections of 1962. If ratified, the provision and its implementing statute, Chapter 6-61, Laws of Florida, 1961 (Appendix D-2), would effect small changes in legislative apportionment. Both the existing and the proposed laws were attacked.

Traditionally Florida has had a bicameral legislature and reapportionment problems are not novel to the state. Faced with population growth and shifts in popu-

lation centers, the Legislature in 1923 proposed a constitutional amendment for consideration of the electorate. The proposal, which created several new senatorial districts and called for apportionment in 1925, and every ten years thereafter, was approved by the people and became part of the organic law of Florida. In 1925, some reapportionment was accomplished but it was modest. In 1935, no reapportionment occurred. Reapportionment in 1945 was token; and as the Legislature convened in 1955, counties having approximately 17% of the state's population elected a majority of both the Senate and House of Representatives. A stalemate reached during legislative sessions of 1955 resulted in publication of a "white paper" in the Journal of the House of Representatives (September 28, 1955) wherein those subscribing to the document correctly noted that

> "in no other state in the United States is such a small percentage of the people able to elect a majority of the members of either branch of their legislature. In no other state is so much political power held by so few."

So too in the conclusion of that paper, it was said:

> "We have been forced to the firm conclusion that the underlying reasons for defeat of reapportionment are the refusal of some members . . . to give up their personal political control over state, city and county government and their personal political control over laws affecting large segments of the business interests of the State."

Reapportionment was a continuing subject of legislative consideration in sessions held between 1955 and 1961. There was no reform, however. By 1961 a majority of the Florida Senate was elected from counties having 12.3% of the state's population, rather than 17.6% as in 1955, and likewise a majority of the House

was elected from counties having 14.7% of the population, rather than 17.0% as in 1955. These changes resulted because of increases in the population of more populous counties, not because of apportionment measures enacted in the interim. By 1961, however, changes were proposed in the form of a constitutional amendment to Article VII of the Florida Constitution which was to be submitted for ratification in the general elections of 1962. If approved, the constitutional provision was to be implemented by amendment of Chapter 10, Florida Statutes (Appendices D-1 and D-2). The proposed changes would have permitted counties having 12.8% of the population to control the Senate and 17.7% to control the House. These percentages remained among the nation's worst in terms of representative government.

With this background, and in response to appellant's attack against both the existing and proposed apportionment laws, a three judge Federal District Court was convened in the Southern District of Florida. In July, 1962, the Court delivered a short but far-reaching opinion in which it agreed with appellant's contentions and declared the existing provisions, Article VII, Section 2 and 3, Florida Constitution and Sections 10.01 and 10.03, Florida Statutes, 1961 (Appendices C-1 and C-2) invalid. *Sobel v. Adams,* 208 F. Supp. 316 (S.D., Fla. 1962) (Appendix A). The Court also stated that in its opinion the proposed revisions (Appendices D-1 and D-2) would not meet the federal requirement of equal protection. The thrust of the Court's judgment appeared to surpass that of any other lower court decision rendered at that time on similar issues. Not only was existing apportionment found inadequate but the applicable laws—both constitutional and statutory—were expressly declared invalid. The Court said:

> "We conclude that the *constitutional and statutory* provisions of the State of Florida which provide for the apportionment and reapportionment are *null, void* and *prospectively inoperative.*"
>
> (At page 318. Emphasis supplied)

Entry of a decree was deferred and the cause continued pending reaction of the Legislature. Taking the cue, the Legislature reconvened at once in extraordinary session. Within a few weeks the pending proposals were withdrawn and legislation was substituted therefor known as House Joint Resolution 30-X (62) (Appendix E-1). This provision was enacted as a constitutional amendment to Article VII. Together with the implementing statutes, Senate Bill 21-X (62) and House Bill 59-X (62) (Appendix E-2), the measures were to become effective upon ratification of the amendment by the electorate in the General Elections of November, 1962. Pursuant to the terms of House Joint Resolution 30-X (62), representation in the House was re-aligned so that a majority of that body would be elected from counties having 27% of the population. Representation in the Senate remained such that between 12 and 13% of the population continued to elect a majority.

On its own motion, the District Court directed the parties in this cause to present argument on the constitutional validity of the new measure.

As already noted, the initial decision of the District Court appeared far-reaching, promising much-needed reform. The Court already had gone farther than most courts considering similar cases elsewhere. Other courts merely said existing apportionment was inadequate. In Florida, the District Court not only disapproved current apportionment but also the existing laws were declared

"null, void and prospectively inoperative." Comforted by the philosophy reflected in the initial decision, appellant renewed his arguments, pointing out that in enacting House Joint Resolution 30-X (62) the Legislature made no significant departure from the results already disapproved by the District Court. The Court, however, rendered a supplemental opinion in September, 1962, which presented an approach to *Baker v. Carr* entirely different from that which the earlier opinion had encouraged appellant to expect. *Sobel v. Adams,* 208 F. Supp. 316 (S.D., Fla. 1962) (Appendix A). The Supplemental Opinion stated that if the electorate ratified the provisions of House Joint Resolution 30-X (62) at the General Elections of November, 1962, Florida would have adopted a rational plan of apportionment meeting federal constitutional requirements. Jurisdiction was retained, however, pending the outcome of the vote and the cause was continued. Approximately seven weeks later, the electorate defeated this proposal.

It was then obvious that a vacuum existed: The District Court had declared the 1961 laws invidiously discriminatory; the Legislature had withdrawn the proposed amendments to those laws as a result of the Court's initial opinion; and the people of Florida had rejected the latest attempt at reapportionment.

Following defeat of the Court-approved plan, the Governor called another extraordinary session of the Legislature which was commenced in late November,

1962. After deliberating twenty days, the lawmakers adjourned without passing any apportionment measures.[1]

On January 29, 1963, the Legislature convened in another extraordinary session pursuant to the Governor's call. On the same day, the Governor requested an Advisory Opinion of the Supreme Court of Florida regarding, primarily, his duty to reconvene the Legislature continuously until a reapportionment solution was effected. The Florida Supreme Court responded with its opinion on January 30, 1963, and delineated the Governor's duties as requested. *In re Advisory Opinion to the Governor,* 150 So.2d 721 (Fla. 1963). The Florida Court further expressed its view that reapportionment legislation could be effected by statutory enactment and need not be submitted to the electorate as a constitutional amendment. Until this time it was generally believed that such legislation must be subjected to public scrutiny as a constitutional amendment. Thus, one possible safeguard against discriminatory apportionment was eliminated.

Immediately thereafter, on February 1, 1963, the Legislature enacted Senate Bill 10-X (63) and House Joint Resolution 5-X (63) (Appendix B). The former offered a reapportionment plan in statutory form. The latter was a companion measure presenting a similar plan as a constitutional amendment to be presented for ratification in the General Elections of 1964.

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[1]The House of Representatives, however, did pass a Resolution in which this statement appears: "(s)ince the state consists of sixty-seven (67) counties, each meriting at least one member of its own in the Legislature, it does not now seem reasonable that the legislative body affording representation to each county be also required to afford the greatest weight to population." The House also requested the Secretary of State to file a copy of the resolution with the District Court considering the instant case. House Resolution No. 47-XX.

Both measures provided for creation of additional seats in the House, the total number being increased to 112. In apportionment of that body, each county received at least one representative. The balance of the seats was allocated on the basis of population to the more populous counties. Twelve of the so-called "middle-sized" counties, with populations ranging from 40,000 to 75,000, lost a representative in the House. Nine of the more populous counties gained from one to eleven representatives. Nevertheless the changes were without real significance. The vote of persons residing in the less populous counties still greatly outweighed that of voters in the more populous counties. A majority of the House was to be elected from counties having about 27% of the state's population.[2]

Both Senate Bill 10-X (63) and House Joint Resolution 5-X (63) likewise effected some change in senatorial districts, the number being increased from thirty-eight as prevailed in 1961 to forty-three. A few new districts were created and certain counties were shifted from one district to another.

Dade County was divided and allocated two senators. Irrationally, however, the measures prohibited division of any county except the most populous one. Ignored was the fact that four other large counties, with Dade, contained 50% of the state's population. More-

[2]Senate Bill 10-X (63) guaranteed to incumbent members of the Senate and House the right to remain seated through the regular legislative session of 1963. Because of this grandfather provision more persons would be seated under Senate Bill 10-X (63) in 1963 than thereafter. For this reason a majority of the House of Representatives in 1963 would be elected by 27.4% of the population. Thereafter a majority would be elected by 29.6%. The grandfather provision did not significantly affect the Senate percentage of 14.5%. Herein appellant uses the percentages applicable when the District Court rendered its final judgment from which this appeal arises.

over, it was provided that thenceforth all senatorial districts should be apportioned "to provide equitable representation based upon similar economic interests, geographic area and population" rather than to reflect substantial equality of population. Previously, the Florida Senate was supposed to be the body apportioned to give fair recognition to population, and earlier enactments had stated that senatorial districts should be apportioned "as nearly equal in population as practicable."[3]

The senatorial districts created by Senate Bill 10-X (63) and House Joint Resolution 5-X (63) allegedly were based upon "similar economic interests, geographic area and population" but no real reforms were effected.

The less populous and older rural counties of the Florida "Panhandle" claimed ten senatorial districts under the 1961 provisions and, after the minor shifts, that area still had ten districts. A crazy quilt pattern of senatorial districts emerged in peninsular Florida with no substantial concessions to population and with no real claim to alignment by geographic or economic standards. Sparsely populated central and south Florida counties, formerly combined with others to form a senatorial district, were designated single districts. This offset any real shift in the balance of power and kept the vote of the electorate in urban areas diluted. Counties containing 14.5% of the state's population elected a majority of the Senate.

Senate Bill 10-X (63) and House Joint Resolution 5-X (63) reflected yet another glaring element of discrimination. The former, enacted by statute, contained

[3]Eq., Section 3, Article VII, Constitution of Florida (Appendix C-1). The potential of such provisions, however, was minimized by an accompanying prohibition against division of any county to create a senatorial district.

no guarantee for reapportionment in later years on a periodic basis. The latter, a constitutional amendment, provided for reapportionment in 1971 and every ten years thereafter. Thus, when voting in 1964 on the amendment, the electorate would be required either to accept the apportionment offered in order to obtain a guarantee of subsequent apportionment or to reject the apportionment and with it the guarantee of subsequent review.

Despite the February, 1963 enactments, the lament of the 1955 "white paper" continued to be appropriate.

A Legislature elected under apportionment laws already declared "null, void and prospectively inoperative" quickly passed the two measures on Friday, February 1, 1963. The Governor approved them on Monday, February 4, 1963, and on the same day Appellee Adams filed a motion with the District Court to determine the constitutional validity of the provisions. By telegram of February 4, 1963, the Court directed the parties to appear for final argument on February 7, 1963, and on the same day, after hearing, the Court entered its Final Judgment approving as constitutional the provisions of Senate Bill 10-X (63). The Court did not rule upon the validity of House Joint Resolution 5-X (63). It is from the action of February 7, 1963 that this appeal is prosecuted.

The Questions Are Substantial

This appeal raises questions of substantial importance to citizens of Florida and to the population of the United States. The underlying issue is the nature of state government. If American society accepts representative government as an important value, it is urgent that the Supreme Court of the United States establish standards by which this value can be expressed. There can be no doubt that the apportionment provisions in many states are inadequate. The literature that has come forth since *Baker v. Carr* demonstrates broad dissatisfaction with the *status quo*. It points up the recalcitrance of many of the state legislatures to correct the situation by giving each voter a reasonably fair stake in his future, by allowing him a reasonably fair vote. But as appellant has learned in this case, reforms do not arise *sua spontante*. It is not necessary to embark upon sociological disquisitions to apprehend that power groups seldom relinquish their power on their own initiative.

The Florida situation has about it a touch of pathos. Unlike the Legislature of Tennessee, the Legislature of Florida did from time to time make gestures of adjustment in the reapportionment of the State. A few steps were taken, but the steps were too short. The changes have afforded no substantial improvement towards solving the needs of a State that more than any other in the Southeast region of the United States has undergone profound political, sociological, and economic changes, especially since World War II.

If the State will not reform itself, appellant and those similarly situated can only appeal to the Supreme Court of the United States for a more detailed analysis

of *Baker v. Carr* and for major directions for the guidance of the lower Federal Courts. Appellant agrees with the statement of Robert F. McKay:[4]

> "If asked to indicate the two most important cases decided by the Supreme Court of the United States in the 20th Century, informed observers would be likely to name, in whichever order: *Brown v. Board of Education* and *Baker v. Carr.*"

A. *Will the Supreme Court of the United States give a more definitive treatment to the holding in Baker v. Carr?* Shortly after the decision in *Baker v. Carr,* the appellant successfully obtained a ruling from the District Court that the then existing Florida constitutional and statutory provisions were unconstitutional, "null, void and prospectively inoperative." The Court found that the Legislature had not taken into proper account the population factors in the State, and the Court cited some of the more marked disparities in representation between large and small constituencies, both for the House and Senate. *Sobel v. Adams,* 208 F. Supp. 316 (S.D., Fla. 1962). As a consequence of this forthright action, the Legislature made some changes which appellant claims are not essentially different from the legislation first declared unconstitutional. Several groups, such as the Mayors' Conference on Fair Apportionment, developed and sought to present to the Legislature proposals that might have brought far-reaching improvements in the apportionment system. These were ignored. And much to the dismay of appellant, the District Court upheld the new legislative system; the Court apparently took minor changes as a sign of co-operation and preferred to wait for future guide lines.

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[4]Political Thickets and Crazy Quilts:
Reapportionment and Equal Protection,
61 Mich. L.Rev. 645 (1963)

It is hard to read the final opinion of the District Court and to conclude that the present law, Senate Bill 10-X (63), differs materially from the 1961 legislation that the Court had so valiantly cut off. The appellant is left with a Pyrrhic victory, and if the situation remains as it is, *Baker v. Carr* a beautiful, mysterious mirage.

B. *Will the Supreme Court of the United States devise a formula to assist Legislatures or, if necessary, District Courts to establish a fair population basis for the election of state legislators?* Much has been written in the journals and lower court cases about the necessity of taking into account population factors in arriving at apportionment formulas. The appellant believes that population should be the controlling factor in at least one body and the primary consideration in apportionment of both the House and the Senate. If either body of the Legislature is composed of an entrenched minority with veto power, the political situation is not much improved by even the broadest representation in the other house.

The District Court has made its position clear. In approving an earlier plan, quite similar in result to the one now attacked, the Court observed:

> "Certainly it cannot be said that the proposed apportionment of the Florida Legislature reaches approximate equality on a strict basis of population."
>
> (208 F. Supp. at page 321.)

In its later opinion, *Sobel v. Adams,* 214 F. Supp. 811, 812 (S.D., Fla. 1963), the Court has reiterated:

> "But if it be required that both branches of the legislature, or either branch, must be apportioned on a strict population basis then, admittedly, neither the rejected amendment nor the statutory enactment would pass the test."

Moreover, the Court is of the opinion that if in one house the population factor is heavily weighted, *though not controlling,* then "population need not be a major factor in the apportionment of the other house." *Sobel v. Adams,* 208 F. Supp. 316, 323 (S.D., Fla. 1962).

It is appellant's contention that the population factor is negligible in the Senate and inadequately weighted in the House, and that glaring inadequacies occur in other respects throughout the apportionment plan.

Florida, in 1960, had a population of almost five million and today has well in excess of that figure. The State is the fastest growing state in the South, has seven of sixty-seven counties with a population of over 200,000, and one county, Dade, has a population of approximately one million.

A few examples of invidious discrimination resulting from the law ultimately approved by the District Court, are:

1. Senate Bill 10-X (63) keeps control of the House in counties having 27.4% of the population;

2. Senate Bill 10-X (63) keeps control of the Senate in counties having 14.5% of the population;

3. Seven counties in the State (Dade, Duval, Hillsborough, Pinellas, Broward, Palm Beach and Polk), have 60% of the State's population. They are represented by 16.3% of the Senate and 41% of the House;

4. Five counties in the State (Dade, Duval, Hillsborough, Pinellas and Broward), have 50% of the State's population. They are represented by 11.6% of the Senate and 34% of the House;

5. Dade County, where appellant is a registered voter, has 18.88% of the total population. It is represented by 4.65% of the Senate and 12.5% of the House;

6. Three small counties (Levy, Dixie and Gilchrist), with a total population of 17,711, have .026% of the population of the State. These counties are represented by 2.32% of the Senate, and 2.86% of the House;

7. A senator from Dade County represents 467,523 persons. The senator from the district composed of the three counties in 6, *supra,* represents 17,711 persons;

8. A representative from Dade County represents 66,789 persons. The representative from Gilchrist County represents 2,868 persons; from Levy County, 10,364; and from Dixie County, 4,479. A representative from Dixie County has approximately 15 times more voting power than a representative from Dade; and a representative from Gilchrist County has 23 times more voting power than a representative from Dade;

9. Dade County, with approximately one million people, has two senators; Columbia County, with approximately 21,000 people, has one senator. A senator from Columbia has approximately 25 times more voting power than a senator from Dade.

Discrimination results, too, when the present plan is considered in another light. With representation so unbalanced, appellant as a taxpayer is discriminated against by the administration of a fiscal policy designed by the Legislature. Appellant resides in Dade County which contains 18.88% of the State's population. In 1961, Dade contributed over 100 million dollars, or 22.7%, of the state taxes collected in Florida. In turn,

during 1961, Dade received only 8.05% of the monies distributed to counties from state taxes. This amounts to taxation with partial representation.

These examples indicate an appalling want of equality. If population is to be taken seriously in an apportionment plan, then the Florida plan is invalid. This Court, in *Baker v. Carr,* said at page 226:

> "Judicial standards under the Equal Protection Clause are well developed and familiar."

Mr. Justice Brandeis, in speaking of the equal protection clause, emphasized that to conform with the constitutional requirements, action must be reasonable. *Quaker City Cab Co. v. Pennsylvania,* 277 U.S. 389 (1928) (dis. opinion). At page 406, he further defined reasonable action as that

> " . . . which an informed, intelligent, just-minded civilized man could rationally favor."

One way to approach reasonableness, absent a more objective standard, is to compare the Florida situation with the positions taken in other cases by District Courts and State Courts following *Baker v. Carr.*

In the Alabama case of *Sims v. Frink,* 208 F. Supp. 431 (M.D., Ala. 1962), pending appeal to the United States Supreme Court (sub nom *Reynolds v. Sims*), the District Court found inadequate an apportionment plan that would permit 27.6% of the population to control the Alabama Senate. In Florida the comparable senatorial percentage is 14.5%. The Alabama District Court also found the 27% figure inadequate for the House. The comparable Florida figure is 27.4%.

In the New York case of *W. M. C. A., Inc. v. Simon,* 202 F. Supp. 741 (S.D., N.Y. 1962), a Federal District Court denied challenges to the reapportionment system of that state. On appeal, the case was remanded by the United States Supreme Court. *W. M. C. A., Inc. v. Simon,* 370 U.S. 190 (1962). One study of the population factors in New York indicates that 40.9% of the population could elect the State Senate, and 37.1% of the population could elect the State Assembly.[5] This is a far more favorable position than obtains in Florida.

The same study[6] indicates that in Georgia[7] 55% of the population can elect 22% of the Senate. The nearest comparable figure for Florida is that 50% of the population can elect 11.6% of the Senate.

In the Colorado case of *Lisco v. McNichols,* 208 F. Supp. 471 (Colo. 1962), the District Court criticized a proposed plan in Colorado and said:

> "Also noteworthy is the fact that 29.8 per cent. of the 1960 population is capable of electing a majority of the Senate, and 32.1 per cent. of the population is capable of electing a majority in the House of Representatives."
>
> (208 F. Supp. at 475)

That particular plan, which was withdrawn by the Colorado Legislature for a substitute plan ratified by the people, was nevertheless far superior to the Florida plan which has been upheld. Comparative Florida figures are 27.4% for the House and 14.5% for the Senate.

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[5]Note: *Baker v. Carr and Legislative Apportionments: A Problem of Standards,* 72 Yale L.J. 968, 1019 (1963)

[6]ibid., page 1010

[7]See, *Toombs v. Fortson,* 205 F.Supp. 248 (N.D.,Ga. 1962). The Georgia situation is now on appeal to this Court.

In the Delaware case of *Sincock v. Duffy*, 215 F. Supp, 169, 185 (Del. 1963), the Court said:

> "In apportioning the House of Representatives the basis must be one of population."

In treating apportionment of the Senate, the District Court of Delaware observed that it was permissible to take non-population factors into consideration, but that these deviations could not be wide, and that the heaviest weight must still be given to the population factor in the Senate as well.

In Oklahoma, the District Court in *Moss v. Burkhart*, 207 F. Supp. 885 (W.D., Okla. 1962), went even further than did the court in Delaware. The District Court of Oklahoma ordered that the Oklahoma Legislature be reapportioned on the general principle of substantial numerical equality

> " . . . to the end that each voter shall have approximately the same power and influence in the election of members of the two houses."
> (207 F. Supp. at 898)

In the Nebraska case, *League of Nebraska Municipalities v. Marsh*, 209 F. Supp. 189 (Neb. 1962), a District Court, although withholding final judgment, severely criticized an apportionment plan for a unicameral system. The inequities were demonstrated by a situation in which the least populous district of 18,824 persons had the same representation as a district of over 100,000 persons, giving to the smaller district over five times as much power as the larger one. This discrepancy is minor when one compares the 25 to 1 ratio in Florida between Dade County and Columbia County as regards senatorial representation or, as regards the House, the ratio of 15 to 1 between the Dixie County representative and a representative from Dade.

In the Wisconsin case, *State of Wisconsin v. Zimmerman,* 209 F. Supp. 183 (W.D., Wisc. 1962), the District Court, though not taking final action, questioned a situation in which 40% of the people could control the Assembly and 42.5% the Senate. In Florida 27.4% of the population can control the House, and 14.5% the Senate.

Similarly, in the case of *Thigpen v. Meyers,* 211 F. Supp. 826 (W.D., Wash. 1962), the District Court, withholding final action, considered defective the situation in Washington State, wherein 38% of the population could control the House, and 35.6% could control the Senate.

In Michigan, the Supreme Court of that state in *Scholle v. Hare,* 116 N. W. 2d 350 (Mich. 1962), held unconstitutional amendments that apportioned the state into senatorial districts so that some districts had more than double the population of other districts. In comparison to the districts formed in Florida, those in Michigan are incomparably superior in broadening the population base.

In Rhode Island, the State Supreme Court in *Sweeney v. Notte,* 183 A. 2d 296 (R.I. 1962), declared unconstitutional reapportionment provisions of the state legislature that diluted the vote of a majority of the electorate to one-fourth of that enjoyed by others. The opinion of that Court pointed out areas of discrimination certainly no worse than those obtaining in Florida.

In Virginia, the District Court in *Mann v. Davis,* 213 F. Supp. 577 (E.D., Va. 1962), found apportionment statutes invidiously discriminatory that were not appreciably dissimilar from those in Florida, and certainly no worse.

Conversely, in Maryland, the Court of Appeals for that state, in *Maryland Committee for Fair Rep. v. Tawes,* 184 A. 2d 715 (Md. 1962), upheld a reapportionment plan which, in our reading, is not too dissimilar from those of Virginia and Florida. This latter case is docketed for appeal in this Court.

Although others might analyze these cases by different procedures, appellant submits that the same disparities would emerge. *With the possible exception of Maryland, no federal or state court has approved a plan offering so little representation to a majority of the voters as the plan which has been approved in Florida.* By virtue of the District Court's decision, Florida appears doomed to maintain its historical position at the bottom of the list.

C. *Will the Supreme Court of the United States express an opinion as to the extent to which non-population factors may determine the nature of a reapportionment plan?* The appellant does not wish to argue from an absolutist position. He assumes that some variations from a formula principally based on population might be permissible without invidious discrimination. However, when a voter from the senatorial district of Levy-Dixie-Gilchrist Counties has a vote with 28 times as much value as appellant's from Dade, then appellant questions the possibility of a national policy that could condone such a discrepancy.

One justification of the District Court for deviation from a population-oriented plan was:

> "Whatever may be said against the apportionment made by the statute, this can be said for it: it was moulded and shaped by the representatives of the people."
>
> (214 F. Supp. at 812)

This observation would be more persuasive if the representatives of the people who set up the reapportionment plan had been elected from a broadly based population pattern. Instead, the legislature which brought in the new scheme was elected under a plan previously declared invalid.

Additional and representative incongruous features of the present plan include:

1. Six small counties, spread from west Florida to the Keys, each compose a single senatorial district: Columbia, Indian River, Santa Rosa, Putnam, Monroe and Marion. Their respective populations range from 20,077 to 51,616. Lee County, however, with a population of 54,539, shares a senator with Hendry and Collier Counties, which have populations of 8,119 and 15,753 respectively. Neither geographic location nor economic interest can account for the arrangement. Politics can.

2. Lee and Monroe Counties are similar in location and in economic concern. Both are in southwest Florida. Yet Monroe, with 47,921 residents, has been given one senator while Lee, with a population of 54,539, has one-third of a senator.

3. The less populous and older rural counties of "Panhandle" Florida were divided into ten senatorial districts prior to enactment of the present plan. Pursuant to the plan these counties have been re-aligned. Nevertheless, the area continues to have ten districts although population shifts have been slight and economic interests relatively unchanged.

4. In southwest Florida, the crazy quilt pattern rivals grandmother's art. Charlotte County, a Gulf Coast county with significant building, tourist and fish-

ing interests, forms a senatorial district with Highlands, an inland county with an agricultural economy. Only the northeast corner of Charlotte and the southwest corner of Highlands adjoin. To complete the pattern, the neighboring counties of Hardee and DeSoto, whose respective southern and northern borders join, are placed in a district with Glades, on the west shore of Lake Okeechobee. Only the southeast corner of DeSoto and the northwest corner of Glades are in contact. Criss-crossed districts result.

5. Somewhat similarly situated is the 33rd Senatorial District which stretches over a hundred miles from the northwest corner of Osecola County to the southeast corner of Martin with Okeechobee County intervening. Osceola is essentially a farming and ranching area. Martin's economy is based primarily upon the tourist activities of the lower east coast.

6. Dade County is the only county in the state with two senators. While appellant is arguing for a Senate which takes into account the population factor, he finds it incongruous that the Legislature should give Dade one additional senator but expressly prohibit division of other large counties, such as Duval with 455,411 population and Hillsborough with 397,788 population, for the purpose of creating senatorial districts. In fact, the additional senator for Dade illustrates vividly the crazy quilt aspect of the plan.

Not only does the present plan involve surrealistic aspects but also it eliminates several good points. Section 3 of Article VII of the Florida Constitution (Appendix C-1) contained some provisions which offered promise of fairer apportionment. It provided, for example, that the Senate should be apportioned into

districts "as nearly equal in population as practicable." Section 3 was caught in the sweep of the District Court's initial declaration that existing and proposed apportionment laws were "null, void and prospectively inoperative." In January, 1963, the Supreme Court of Florida in its *Advisory Opinion to the Governor,* 150 So.2d 721 (Fla. 1963), stated *obiter dictum* that the effect of the District Court's judgment was to leave the Legislature free to reapportion by statute only. The Legislature accordingly enacted Senate Bill 10-X (63) in statutory form. In so doing it abandoned the constitutional philosophy that senatorial districts should be approximately equal in population. A new test, described as "equitable", was substituted whereby senatorial districts are now apportioned upon a basis of "similar economic interests, geographic area and population." The possibility for more equal suffrage was thus diminished, not enhanced.

Even more alarming is the effect of the Legislature's action on future periodic apportionment. Deposed Section 3, Article VII of the Florida Constitution required decennial reapportionment. Senate Bill 10-X (63) makes no provision for the future except as may be adopted by constitutional amendment. Simultaneously with that statutory enactment, the Legislature passed House Joint Resolution 5-X (63) (Appendix B-2) which is a constitutional amendment to be voted upon in the General Elections of November, 1964. This amendment provides for reapportionment in 1971 and every ten years thereafter. But in order to obtain the guarantee of periodic reapportionment, the people must accept House Joint Resolution 5-X (63) totally, and it also incorporates the apportionment plan of Senate Bill 10-X (63). Thus, if the people wish to turn down the present plan, as they turned down the penultimate one,

they lose the guarantee of periodic review. Yet, if they desire a requirement for periodic review, they must accept, at least until 1971, the plan now in effect.

It is also noteworthy that the constitutional provision invalidated by the District Court required the Governor to keep the Legislature in continuous special session until it accomplished reapportionment. In the past this has had some moral value since the Legislature went through the motions of reapportionment decennially until some minor change was accomplished. There is no such requirement under the present plan or in the proposed constitutional amendment, House Joint Resolution 5-X (63). This injunction to the Governor is omitted.

The perfidy of the situation speaks for itself. If the people refuse to adopt the proposed amendment, because they disapprove of present legislative apportionment, they lose all assurance of future revision. Under Florida law, the provisions of Senate Bill 10-X (63) can prevail for all time. The voters' only solution will rest with a body, representing a minority of the electorate, which can perpetuate its existence and its power.

D. *If the time is not ripe for general flexible principles applicable to all states, will the Supreme Court of the United States review the particular Florida situation on the basis of the total impact of all factors involved?* If this Court should decline at this time to enunciate formal principles of general application for the country at large, going both to population and non-population factors in the reapportionment process, appellant seeks review of the decision below on the ground that all of the factors taken together indicate appellant has been treated unfairly. These factors include the legislative

and judicial history of this case involving four reapportionment plans, all briefly reviewed *supra* in the Statement; the marked discrimination against appellant vis-a-vis both apportionment of the House and apportionment of the Senate, as outlined *supra;* the absence of any legislative standard or District Court standard to overcome a presumption that appellant's vote should be weighted with reasonable similarity to the votes of other persons living in other sections of the State; and the procedural and technical difficulties recited *supra,* that adhere to the Legislature's manipulation of traditional guarantees.

CONCLUSION

It is submitted that the District Court in its decision fails to employ its constitutional powers to protect appellant, and those similarly situated, against invidious discrimination. The rights guaranteed to appellant by the equal protection clause of the Fourteenth Amendment have been, and continue to be, violated. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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PROOF OF SERVICE

I, Wm. Reece Smith, Jr., attorney for Richard H. M. Swann, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 18 day of July, 1963, I served copies of the foregoing Jurisdictional Statement on the appellees herein named, by mailing copies in a duly addressed envelope, with postage prepaid, to: Honorable Richard W. Ervin, Attorney General, State of Florida, Tallahassee, Florida, Attorney for Appellee Tom Adams; Honorable Darry A. Davis, 116 Dade County Court House, Miami, Florida, Attorney for Appellee Claude R. Brown; Honorable John U. Lloyd, Broward County Court House, Fort Lauderdale, Florida, Attorney for Appellee E. L. Gates; Honorable Paul E. Sawyer, Post Office Box 571, Key West, Florida, Attorney for Appellee W. B. Freeman.

WM. REECE SMITH, JR.
Post Office Box 3239
Tampa 1, Florida.

APPENDIX A

Peter B. SOBEL, on behalf of himself and all others similarly situated, Plaintiff,

vs.

Tom ADAMS, Secretary of State of the State of Florida, Defendant.

Richard H. M. SWANN, Plaintiff,

vs.

Tom ADAMS, Secretary of State of the State of Florida, Defendant.

Civ. Nos. 182-62-M, 186-62-M.

Before JONES, Circuit Judge, and McRAE and DYER, District Judges.

PER CURIAM.

This Court, when this consolidated cause was last before us, held that the then pending proposal to amend the Florida Constitution provided a rational plan of reapportionment of the Florida legislature, free from invidious discrimination. Sobel v. Adams, D.C., 208 F. Supp. 316, 324. The Constitutional amendment was rejected. The Florida Legislature was convened and reconvened in special session. On January 30, 1963, the Supreme Court of Florida, in an advisory opinion to the Governor of Florida, 150 So.2d 721 declared that the legislature might provide for reapportionment by a statutory enactment, notwithstanding the limitations of the Florida Constitution as they were prior to the decision of this Court, supra, on July 23, 1962. On February 1, 1963, the Florida Legislature passed Senate Bill 10-X (63), which provided a 43 Senator, 112 Representative legislature. The statute was approved by the Governor of Florida on February 4, 1963, and comes before us for consideration.

[1-3] The rejected constitutional amendment would have provided for 46 senators and 135 representatives. In some respects it might have advantages over the statutory plan now before us. For example, in our former opinion we thought the suggestion to give a single county more than one senator was unwise. We still have doubts as to the desirability of doing so. The statute gives two senators to Dade County. Although we would not have directed multiple senatorial representation for any county, we certainly should not prohibit it if the state desires it. Our function begins and ends with the determination of rationality and whether there is invidious discrimination. The present plan gives some more weight to the population factor than did the rejected plan. But if it be required that both branches of the legislature, or either branch, must be apportioned on a strict population basis then, admittedly, neither the rejected amendment nor the statutory enactment would pass the test. On the other hand, if the rejected constitutional amendment set up a rational plan, free from invidious discrimination, and by our earlier opinion we have so held, it would follow that the plan now under consideration is likewise rational and free from invidious discrimination. Whatever may be said against the apportionment made by the statute, this can be said for it: it was moulded and shaped by the representatives of the people. As the principles of rationality and of invidious discrimination become better defined and more fully developed, or when further population shifts and industrial expansions take place, the Florida legislature and, if need be, the courts can again make inquiry into the problem of legislative apportionment. If additional extensions of the doctrine of population as a factor in determining representation be found necessary or desirable, it will not be a misfortune if the transition occurs in two or more stages.

[4] We have examined the decisions of other courts dealing with the problem. We have studied the scholarly symposium in the November 1962 issue of the Yale Law Journal. We have had before us a report on Apportionment of State Legislatures of the Advisory Commission on Intergovernmental Relations. We have had the benefit of thorough, painstaking and exhaustive briefs of the parties to this cause and the amici curiae. By none of these are we persuaded that we should depart from the views which have been expressed in our prior opinions. The historical basis of legislative representation as it has obtained in Florida since statehood should not be completely returned except upon a strong showing of a deprivation of equal protection of the law. We think no such showing has been made. We decide that the Florida statute, providing for apportionment, enacted by the Florida Legislature on February 1, 1963, and approved by the Governor of Florida, does not, in any respect, violate the Constitution of the United States. This being so, the cause has become moot. We judicially notice the fact that the Governor of Florida has initiated steps for the nomination and election of the additional members of the legislature provided by the statute. This eliminates the need for any coercive decree. The motion of Tom Adams, Secretary of State, seeking an order determining the validity of the recent enactments of the Florida legislature will be granted as to Senate Bill 10-X (63). The motion is denied insofar as it relates to other legislative enactments. All other motions and petitions not heretofore disposed of will be denied. No costs will be allowed. Judgment will be entered dismissing the consolidated cause.

Peter B. SOBEL, on behalf of himself and all others similarly situated, Plaintiff,

vs.

Tom ADAMS, Secretary of State of the State of Florida, Defendant.

Richard H. M. SWANN, Plaintiff,

vs.

Tom ADAMS, Secretary of State of the State of Florida, Defendant.

Civ. Nos. 182-62-M, 186-62-M.

United States District Court
S. D. Florida,
Miami Division.
July 23, 1962

Supplemental Opinion Sept. 5, 1962.

Before JONES, Circuit Judge, and McRAE and DYER, District Judges.

JONES, Circuit Judge.

[1] In these cases, here consolidated, like questions are presented and the same relief is sought. They come before us on final hearing. By the facts stipulated and those of which we take judicial notice it clearly appears, and the Court finds, that the existing provisions of the Constitution and statutes of the State of Florida which relate to the apportionment for the nomination and election of the members of the Senate and House of Representatives of the Legislature of Florida are invidiously discriminatory against the plaintiffs in the within causes and against others similarly situated.

Such provisions are in deprivation of the rights of the plaintiffs and their class guaranteed by the Constitution of the United States. Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L.Ed.2d 663.

Each of the three representatives in the Florida House of Representatives from Dade County, the most populous county in the State, represents the equivalent of 311,000 people according to the 1960 Federal census. The member from Gilchrist, the least populous county, would represent 2,868 residents. The five most populous counties average one representative for each 106,000 people. The five least populous counties average one representative for each 3,266 people. The membership of the Florida Senate, considered on a basis of representation of numbers, would show a similar disparity between the more populous and the less populous areas.

The defendants have set forth for us the history of legislative apportionment in Florida. They have outlined for us the efforts made to procure apportionment on a less discriminatory basis. These efforts, particularly in recent years, have met with little success and such changes as have been made fall far short of affording any substantial correction of the inequality of representation. Indeed, it would seem that, because of population increases and shifts, the disproportion increased rather than lessened. Without discrediting the efforts of those who have sought to mitigate the conditions existing from time to time, those efforts did not produce any substantial alleviation of the preexisting invidious discriminations in apportionment, nor do they now afford any rational basis for a reapportionment that will meet the requirement of equal protection of the law. They do not constitute a defense to the claims for relief here asserted.

[2] We do not now decide whether or not this Court has the power to enjoin the submission to the voters of Florida of the now pending amendment to the Constitution of Florida which, if adopted, would reapportion the Florida Legislature. We do not relinquish that power if it exists. We think that it is appropriate to do no more at this time than to say that it is the present opinion of the Court that the reapportionment, which the amendment would make does not meet the Federal Constitutional requirement of equal protection.

The defendants point to Shiver v. Gray, Secretary of State, 5th Cir. 1960, 276 F.2d 568, as a case squarely in point and a precedent which should control our decision. It need only be noted that this opinion was rendered prior to and is in conflict with Baker v. Carr, supra, and is not to be followed.

[3] We find that the Court has jurisdiction of the parties and of the subject matter of the causes; that justiciable matters are presented for decision, and that the plaintiffs have standing to bring and maintain these suits.

We conclude that the constitutional and statutory provisions of the State of Florida, which provide for the apportionment and reapportionment, are null, void and prospectively inoperative.

The plaintiffs and the class represented by them are entitled to such relief as will afford them equal protection of the laws. Before the entry of a final judgment or decree the Court should have the benefit of further evidence and argument on the manner in which the relief should be awarded. The more desirable means of accomplishing the necessary reapportionment is

through state action. The duty to place the state in compliance with the requirement of the United States Constitution rests primarily and rests heavily upon the state itself. Should the state fail or neglect to perform this obligation with that dispatch which the urgency of the matter requires, then the less desirable reapportionment by judicial decree would be required. It seems that there is ample time for a valid reapportionment to be made and become effective prior to the time for the convening of the regular legislative session in 1963.

[4] In order to permit the State of Florida and its officials to undertake a compliance with the requirements of the United States Constitution, it seems appropriate that the entry of a decree be deferred for a reasonable period of time. If, at the end of that period, the Florida Legislature has been convened in special session for effectuating, by legislation or by amendment to the Florida Constitution, or both; or if at that time some other state action has been undertaken, an application for a further continuance would be looked upon with favor. Otherwise the Court will then proceed to fashion a remedy of reapportionment by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of equal protection.

INTERLOCUTORY JUDGMENT

This consolidated cause came on to be heard this day upon the pleadings, the stipulations made and the evidence submitted, and argument of counsel being heard, it is

ORDERED, ADJUDGED and DECREED:

1. That this statutory three-judge court has been duly constituted, has jurisdiction of the parties and

subject matter of the consolidated cause, and has power to adjudicate the controversy presented and to grant such relief as may be appropriate.

2. The Court concludes and hereby determines that the existing constitutional and statutory provisions relating to the apportionment and reapportionment for the nomination and election of the Senate and the House of Representatives of the Florida Legislature are invidiously discriminatory against the plaintiffs and others similarly situated, and deny to them equal protection of the law as guaranteed by the Constitution of the United States. Said provisions are hereby found and declared to be prospectively null, void and inoperative.

3. The consolidated cause is hereby continued until August 13, 1962, at which time the Court will consider the relief to be granted by its final judgment.

Supplemental Opinion

In the opinion of this Court of July 23, 1962, it was found that the Court has jurisdiction of justiciable issues which the plaintiffs have standing to raise. It was also found that the existing provisions of the Constitution and statutes of the State of Florida which relate to the nomination and election of the members of the Senate and the House of Representatives of the Legislature of the State of Florida are invidiously discriminatory and in conflict with the Equal Protection clause of the Fourteenth Amendment. The Court recognized the duty of the State of Florida to recast its legislative apportionment so as to be in harmony with federal constitutional requirements. In its hope, then and now entertained, that reapportionment would be accomplished by state action, and in its desire to avoid,

if possible, the imposition of predetermined judicial formulae, the Court refrained from laying down any straight-jacketing criteria. The Court continued the cause until August 13, 1962. On July 24, 1962, the Governor of Florida issued a call for the Legislature to convene in extraordinary session on August 1, 1962, for the sole purpose of considering reapportionment of the Florida Legislature. The Legislature met, took action and adjourned.

The Legislature withdrew from electoral consideration the proposed amendment to the Florida Constitution relating to legislative apportionment which it had submitted at its 1961 session. S.J.R. No. 216, Laws of Florida, Acts of 1961, p. 1165. A new proposal for a constitutional amendment, incorporated in House Joint Resolution 30X, passed both Houses and, unless prohibited by judicial decree, will be submitted to the voters of Florida at the regular election to be held in November, 1962. The proposed amendment would continue the bicameral legislature which Florida has had since it became a state. It would carry on the traditional division of the State into senatorial districts composed of one or more counties and the allocation of one or more representatives to each county. The proposed amendment would give one representative to each of the counties of the State. Provisions would be made for representative ratios. A representative ratio is defined as the quotient obtained by dividing the population of the State by the number of counties. Each county would have one additional representative for each representative ratio or major fraction thereof. Any county having more than four representative ratios shall have another representative. The Senate is to consist of forty-six members, each representing a district. Each of the twenty-four most populous counties

shall constitute a district. The other twenty-two districts are to be created from the remaining forty-three counties. In 1971 and every ten years thereafter the Legislature is to reapportion itself in accordance with the constitutional requirement.

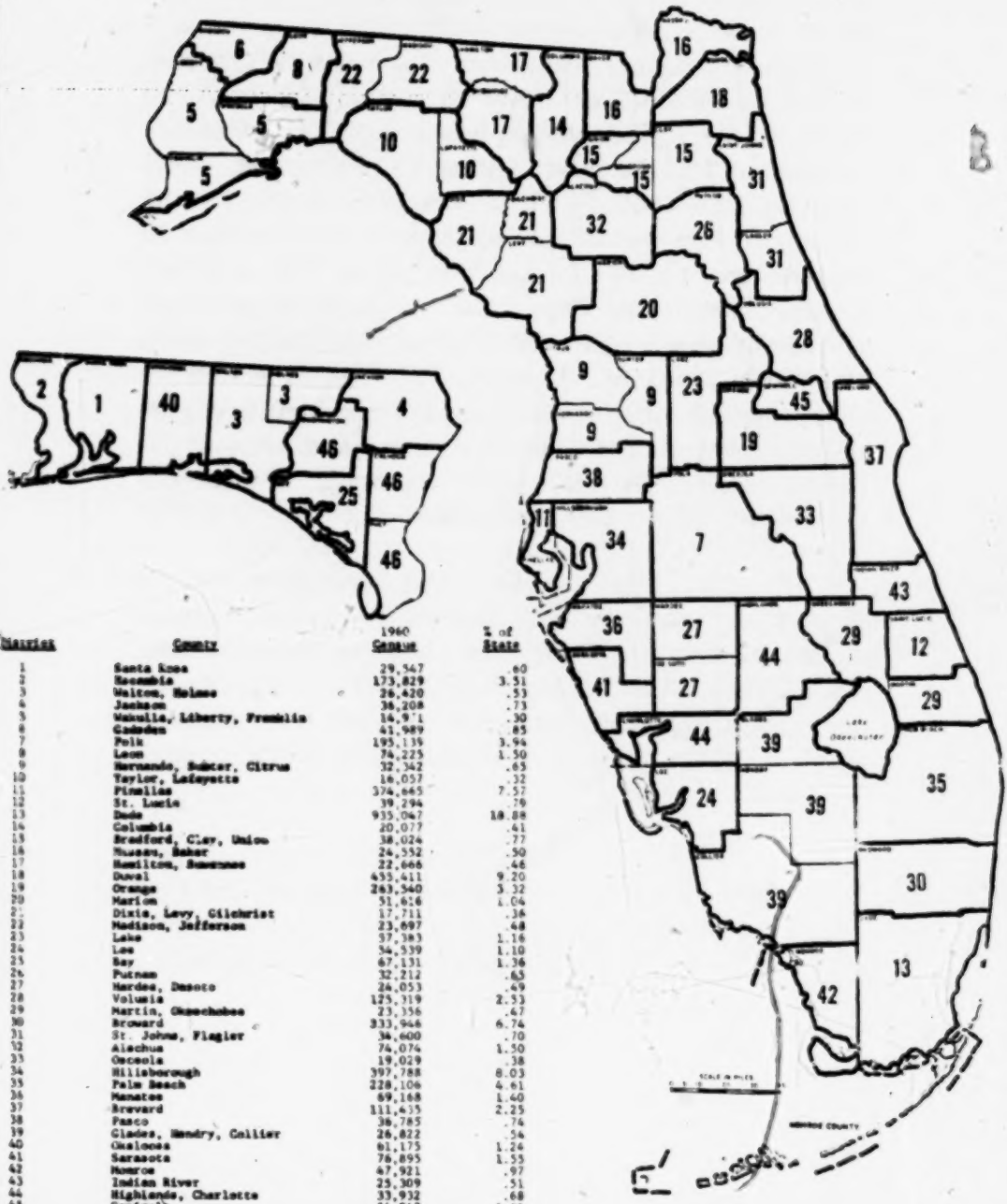
The Legislature enacted two statutes to implement the proposed constitutional provision, each to become effective upon the adoption of the constitutional amendment. One of these would make an apportionment of the members of the House of Representatives in accordance with the formula set out in the proposed amendment. Dade County would have fifteen representatives, Duval eight, Hillsborough, Pinellas and Broward Counties would each receive seven representatives, Orange would get five, Palm Beach and Polk would each be given four, and Escambia, Volusia and Brevard Counties would each be allotted three representatives. The next thirteen counties, ranked by population, would receive two each. The remaining forty-three counties would have a single representative.

The other statutory enactment would make provision for senatorial districts of the number specified in the proposed amendment. The counties to comprise these districts, the district numbers given to them, and the populations of the several proposed districts are as shown on the following map.

46 SENATORIAL DISTRICTS

CREATED BY SENATE BILL NO. 21-X (62)

SHOWING 1960 POPULATION



District	County	1960 Census	% of State
1	Santa Rosa	29,547	.60
2	Escambia	173,829	3.51
3	Walton, Holmes	26,420	.53
4	Jackson	36,208	.73
5	Wakulla, Liberty, Franklin	14,971	.30
6	Gadsden	41,989	.85
7	Polk	195,139	3.94
8	Leon	74,225	1.50
9	Hernando, Baker, Citrus	32,342	.65
10	Taylor, Lafayette	16,057	.32
11	Pinellas	374,665	7.57
12	St. Lucie	39,294	.79
13	Dade	935,047	18.88
14	Columbia	20,077	.41
15	Bradford, Clay, Union	38,024	.77
16	Nassau, Baker	24,552	.50
17	Hamilton, Suwannee	22,666	.46
18	Duval	455,411	9.20
19	Orange	263,540	5.32
20	Marion	51,616	1.04
21	Dixie, Levy, Gilchrist	17,711	.36
22	Madison, Jefferson	23,697	.48
23	Lake	57,383	1.16
24	Lee	54,539	1.10
25	Bay	67,131	1.36
26	Putnam	32,212	.65
27	Hardee, Desoto	24,053	.49
28	Volusia	125,319	2.53
29	Martin, Okeechobee	23,356	.47
30	Broward	333,946	6.74
31	St. Johns, Flagler	34,600	.70
32	Alachua	74,074	1.50
33	Osceola	19,029	.38
34	Hillsborough	397,788	8.03
35	Palm Beach	228,106	4.61
36	Manatee	69,168	1.40
37	Brevard	111,435	2.25
38	Pasco	36,785	.74
39	Glades, Hendry, Collier	26,822	.54
40	Okaloosa	61,175	1.24
41	Sarasota	76,895	1.55
42	Monroe	47,921	.97
43	Indian River	25,309	.51
44	Highlands, Charlotte	33,932	.68
45	Seminole	54,947	1.11
46	Washington, Gulf, Calhoun	28,608	.58
TOTAL		4,951,560	100.00

It is asserted by the plaintiffs, by the defendant Supervisor of Registration of Dade County, and by the Mayor of the City of Miami appearing amicus curiae in his own behalf as a citizen and voter, that the legislative apportionment which would result from the proposed constitutional amendment is invidiously discriminatory and should be disapproved by the Court. The work of the legislature is defended by the Attorney General of Florida, representing the defendant Secretary of State; and by three members of the Florida House of Representatives appearing amici curiae as citizens and voters. In the hearing of this case the County Attorney of Dade County, appearing on behalf of the Supervisor of Registration of that County, made the observation that "the question presented is whether the proposed apportionment under consideration produces representation that is rational and without invidious discrimination." Such, we agree, is a proper statement of the problem before us.

[5] This litigation, like suits pending or decided in perhaps half or more of the states, was precipitated by the decision of the Supreme Court in Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663. This landmark decision is important here, not only for that which is decided but for that which is undecided. In the opinion it is said:

> "[W]e hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief;

and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes." 369 U.S. 186, 197-198, 82 S.Ct. 691, 699.

It was noted by the Court that the District Court would be able to fashion relief if violations of constitutional rights were found. It was stated by the Court that it was not necessary to decide whether the plaintiffs would, on a trial, be entitled to relief. This and no more is the holding of Baker v. Carr. It is not required that, in all events, either or both houses of a bicameral legislature must be apportioned upon a population basis of either exact or approximate equality of representation. It is only when the discrimination is invidious or lacking in rationality that it clashes with the Equal Protection clause of the Fourteenth Amendment. Mr. Justice Clark suggests that there must be a plan that follows a rational policy. 369 U.S. 186, 258. Mr. Justice Douglas, in his concurring opinion in Baker v. Carr, notes that "Universal equality is not the test; there is room for weighting." Mr. Justice Douglas cites Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.St. 461, 99 L.Ed. 563, for a statement of the rule that "the prohibition of the Equal Protection Clause goes no further than the invidious discrimination." 369 U.S. 186, 244-245, 82 S.Ct. 691, 724.

It is our considered view that the rationality of a legislative apportionment may include a number of factors in addition to population. Certainly it cannot be said that the proposed apportionment of the Florida Legislature reaches approximate equality on a strict basis of population. In Florida, from the inception of its statehood, every county has had at least one member of the House of Representatives. The earliest Con-

stitution of the State provided that there should be given "one representative to every county." Fla. Const. 1838, Art. IX, Sec. 1. Such was the provision of the intervening Constitutions. Fla. Const. 1861, Art. IX, Sec. 1; Fla. Const. 1865, Art. 9, Sec. 1; Fla. Const. 1868, Art. XIII, Sec. 1. Such is provided by the present Constitution of the State. Fla. Const. 1885, Art. VII, Sec. 3, F.S.A.

Most of the cities and towns in Florida have been created by special acts of the Legislature. Except for Dade County which has a home rule charter, much of the law relating to the county governments is in the form of special acts of the Legislature. The State of Florida has not, as has been done in some states, provided for uniform legislation regulating and providing for the government of counties and the municipalities within them, and prohibiting special legislation for cities, towns and counties. In the 1961 session of the Florida Legislature 1266 special acts were passed relating to counties and municipalities. One or more of these special acts applied to each of sixty-four of Florida's sixty-seven counties, and to over a hundred municipalities. The enactment of the special acts is procured by the legislative delegations from the affected areas with the heavier burden resting upon the member or members of the House of Representatives from those counties which are joined with another or others in senatorial districts. The measures included in these special acts are of vast importance to the people of the respective counties or municipalities to which they apply. We are not convinced that this phase of the exercise of state sovereignty could be adequately carried out if a substantial number of the less populous counties of the State of Florida were deprived of the benefit of representation in the Legislature. The way

of the State of Florida in providing for the government of its counties and municipalities may not be the best of possible methods but we are not willing and doubt that we are able to require that it be changed. We do not think it would be reasonable to render unworkable the system by which a very large part of the State's legislative function is exercised. Such would be the result of a requirement that counties should be combined into districts for the apportionment of the members of the House of Representatives. The consolidation of many of the smaller and less populous counties with a contiguous one has been suggested. Desirable as this might be, it is not a cure for malapportionment which we are authorized to administer. The Supreme Court of Florida, in a headnote by the Court, has said:

> "A county is a political subdivision of the state, created for administrative purposes, is representative of the sovereignty of the state and auxiliary to it. Its functions are of a public nature; it is political in character, and constitutes the machinery by and through which many of the powers of the state are exercised." Keggin v. Hillsborough County, 71 Fla. 356, 71 So. 372.

We conclude that it is not invidiously discriminatory for the citizens and voters residing in each of these political subdivisions to be represented in the House of Representatives. We make the determination that it is entirely rational for the people of each of these representatives of the sovereignty of the state to elect at last one of their own number to represent them in their Legislature.

[6] Once it has been determined, and we do so determine, that it is permissible so to apportion the Florida House of Representatives as to allot at least one member to each county, the question arises as to

whether this can be and that there also be an apportionment on a strict basis of population. It is obvious that this cannot be done. To have such an apportionment would create a body of such size that its physical accommodation would be difficult if not impossible. Its numbers would create an unwieldy body incapable of functioning with that deliberation which we associate with the legislative process. In designing the formula for apportioning the House the population factor weighed heavily. It was, if not the predominant factor, second only to that of county representation. If apportionment of the House of Representatives were to be based solely upon population by counties a majority would be from five counties; the Dade and Broward portion of the Lower East Coast, the Hillsborough and Pinellas locale of the Tampa Bay area, and Duval County in the Northeast part of the State. On a basis of representation only by population the fifty least populous counties would have no more seats in the House than Dade County, the most populous of the counties. The zeal of the advocates of strict apportionment by a rigid population allocation fails to convince us that the results so achieved would be rational. The plan proposed by the Legislature of a representative from each county with additional representatives distributed on a basis of a population ratio seems to us to provide a formula which secures the desirable county representation and a reckoning, to the extent required, of the population factor.

The Senate apportionment as proposed by the Legislature might seem, at first blush, to resemble the crazy quilt to which Mr. Justice Clark referred in his concurring opinion in Baker v. Carr, 369 U.S. 186, 258, 82 S.Ct. 691, 7 L.Ed.2d 663. But a study of the groupings which the Legislature has made discloses a pattern not

without logic and reason. The apportionment is by districts, forty-six in number. Districts are of counties or groups of two or more counties. No county is divided into two or more districts. Thus Dade County, whose population is nineteen per cent. of that of the State, has but one of the forty-six Senators. Thirty other counties comprise senatorial districts, and fifteen districts are composed of two or three counties. Because such a large portion of the legislative function in Florida deals with special acts applicable only to a single county or municipality, we think it would be unwise and illogical to provide for more than one Senator from any one county, except perhaps from Dade which enacts its own local legislation. Under the plan before us the House of Representatives would be apportioned by a formula in which population is heavily weighted. Because of this we think that population need not be a major factor in the apportionment of the other House. Such apportionment must, however, be made upon a rational basis.

In the proposed groupings of the counties forming the senatorial districts there is, we find, not only common geographical locations and contiguous areas, but a somewhat general unity of economic interests which result in the combinations being desirable for the purpose of legislative representation. So too, it may be said that logic has dictated, in most instances, the absence of some groupings into districts which might have been made if location and population were the sole considerations. Holmes and Walton Counties are joined in District 3. These counties are agricultural in character and have common interests and objectives. Although these counties have an aggregate population of less than 27,000, it would seem reasonable not to join them with their larger neighbor on the West, Okaloosa County

which has a population of over 60,000 and has within its boundaries the large Eglin Air Force Base. Nor would it seem illogical to refrain from combining it with Washington County on the East since it is combined with two other counties. The Legislature concluded that no more than three counties should be combined in a single senatorial district. We cannot say that such conclusion is not well-founded. It would seem improper to put these counties in the same district with Bay County and its 67,000 people who have in their midst a large papermill, a Navy base and a thriving tourist activity.

District 5 is composed of Wakulla, Liberty and Franklin Counties forming a compact area near the beginning of the Florida Panhandle. For the most part their economy is the same, although Wakulla has a greater tourist play than the others. So also Franklin has a much greater fish and oyster production than Wakulla. Liberty is an inland county and has but little of commercial fishing on the Apalachicola River. Other examples might be cited. It is possible, even probable, that alignments of counties have been made with no more logic than flows from the necessity of creating districts from neighboring counties. It is possible, but we refrain from saying probable, that some of the county alignments or absence of alignments were the result of the political necessity of concessions in order to procure the passage of the measures we have before us. Disparities and departures from the plan may be pointed out but these are mainly of a de minimis nature and are not such as, in our judgment, render the plan invidiously discriminatory or rob it of its rationality. Like the proposed apportionment of the Florida House of Representatives, that which has been proposed for the Senate meets the test of constitutional equal protection.

The need for reapportionment arises, we are told, because of a strangle hold which the rural areas have had upon the Florida Legislature. What is urban and what is rural, so far as a county is concerned, may depend upon a point of view. For example, Polk County is the eighth Florida county in population. Nine of its cities have in excess of 2,500 residents. Less than half of the county population live in these nine cities. The county is usually thought of as a citrus growing, cattle raising, agricultural area. Yet it has highly unionized citrus packing and canning plants. Nearly 70 per cent. of the world's supply of phosphate is mined in Polk County and much of it is processed there into chemicals, fertilizers and building materials. Polk County, it would appear, is neither urban nor rural but has attributes of both. An area which was rural yesterday may cease to be so tomorrow. The 1950 census showed Brevard County as having a population of 23,653. In 1960 the population was 111,435. Not too long ago the persons living in the county derived their income from citrus growing and packing, the raising of gladioli, saw-milling, and cattle raising, in addition to a thriving tourist business. It was a rural county. The installations of the Federal Government at Cape Canaveral provide payrolls for 40,000 or more persons. The county has less of its former rural character.

If there has been any strangle hold we think the proposed plan will result in the breaking of it. If there are inequitable spots in the proposed scheme they can be eliminated in future legislative sessions or, if need be, by a further change in the Florida Constitution. If any constitutionally unequal discrimination develops and the Legislature neglects its duty, then an application can again be made to the courts for relief.

In dealing with a problem which is not wholy devoid of a political tinge, our confidence in the correctness of our decision would in some measure be enhanced by the sharing of our views by those skilled in statecraft. The plan incorporated in the proposed constitutional amendment and implementing legislation is not the same as, but is not too different from, that which the Governor of Florida presented to the Legislature. Former Governor Warren, during the session of the Legislature, recommended that it pass the Governor's plan or something closely resembling it.

Since 1946 the Florida Bar has had a Constitution Committee engaged in a study of the Florida Constitution and of proposals for its revision and amendment. On this Committee many distinguished lawyers have served, some of whom are members of the Legislature. Its drafts of the article relating to apportionment is very like that which will come before the voting citizens in November.

[7] There is a presumption that the provisions of a state constitution or statute are not invalid when measured by the Constitution of the United States. This presumption will attach to the proposed amendment to the Florida Constitution and to the legislation dependent upon it. That presumption prevails.

The plaintiff Peter B. Sobel has filed a motion for the entry of a judgment apportioning both Houses of the Florida Legislature. The motion will be denied.

If the constitutional amendment which the Florida Legislature has submitted to the electors of the State for ratification or rejection at the general election in November of this year is ratified, the State will have

then adopted a rational plan of reapportionment, free from invidious discrimination. This cause will then have become moot and should then be dismissed. If the proposed amendment is rejected further appropriate action can be taken by the Court and jurisdiction will be retained for that purpose. Meanwhile the cause will be continued.

An order will be entered to give effect to the conclusions herein set forth.

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APPENDIX B-1

SENATE BILL NO. 10-X (63) — ENGROSSED

A BILL
TO BE ENTITLED

AN ACT PROVIDING FOR THE APPORTIONMENT OF THE MEMBERSHIP OF THE LEGISLATURE OF THE STATE OF FLORIDA; AMENDING SECTIONS 10.01, 10.03 AND ADDING SECTION 10.04, FLORIDA STATUTES; PRODIVING FOR AN ELECTION; PROVIDING FOR FILLING VACANCIES; PROVIDING EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

Section 1. Section 10.01, Florida Statutes, is amended to read:

10.01 *Division of state into senatorial districts; apportionment of senate, etc.* --

(1) The representation in the senate of the Florida legislature shall consist of forty-three (43) members, each representing a district. The counties of the state shall be apportioned into forty-two (42) senatorial districts and one district shall be added by superimposing over district thirteen (13) district forty-three (43) representing Dade County. The forty-three (43) districts shall be apportioned among the several counties of the state to provide equitable representation based upon similar economic interests, geographic area and population. If by this reapportionment the district of a member of the senate whose term of office expires with the general election of November 1964 shall be

abolished, or the number of his district relocated outside of his present district, then such member shall continue as a senator for the county of his residence during the remainder of his term and shall have an equal vote with any other senator and the number of his senatorial district shall be indicated by adding the letter X after the number of the district to which he was elected even though it increases the maximum number of members herein provided for; no county except Dade shall be divided in creating a senatorial district. Every district shall consist of contiguous counties.

(2) Pursuant to this act forty-three (43) senatorial districts shall be constituted as follows:

First district—Santa Rosa county
Second district—Escambia county
Third district—Walton county, Holmes county and Washington county
Fourth district—Jackson county and Calhoun county
Fifth district—Wakulla county, Liberty county, Gulf county and Franklin county
Sixth district—Gadsden county
Seventh district—Polk county
Eighth district—Leon county
Ninth district—Hernando county, Sumter county and Citrus county
Tenth district—Taylor county, Madison county and Jefferson county
Eleventh district—Pinellas county
Twelfth district—St. Lucie county
Thirteenth district—Dade county
Fourteenth district—Columbia county
Fifteenth district—Bradford county, Clay county and Union county

Sixteenth district—Nassau county and Baker county
Seventeenth district—Hamilton county, Suwannee county and Lafayette county
Eighteenth district—Duval county
Nineteenth district—Orange county
Twentieth district—Marion county
Twenty-first district—Dixie county, Levy county and Gilchrist county
Twenty-second district—Sarasota county
Twenty-third district—Lake county
Twenty-fourth district—Lee county, Hendry county and Collier county
Twenty-fifth district—Bay county
Twenty-sixth district—Putnam county
Twenty-seventh district—Hardee county, DeSoto county and Glades county
Twenty-eighth district—Volusia county
Twenty-ninth district—Indian River county
Thirtieth district—Broward county
Thirty-first district—St. Johns county and Flagler county
Thirty-second district—Alachua county
Thirty-third district—Osceola county, Okeechobee county and Martin county
Thirty-fourth district—Hillsborough county
Thirty-fifth district—Palm Beach county
Thirty-sixth district—Manatee county
Thirty-seventh district—Brevard county
Thirty-eighth district—Pasco county
Thirty-ninth district—Okaloosa county
Fortieth district—Charlotte county and Highlands county
Forty-first district—Monroe county
Forty-second district—Seminole county
Forty-third district—Dade county

Section 2. Section 10.03, Florida Statutes, is amended to read:

10.03 *Representation in the House of Representatives.* —

(1) Representation in the house of representatives shall consist of one hundred twelve (112) representatives which shall be apportioned among the counties by the method of equal proportions; that is, each county shall have one representative and the remaining representatives shall be assigned to the counties in proportion to population.

(2) Pursuant to subsection (1) of this section, there shall be one hundred twelve (112) members of the house of representatives apportioned among the several counties as follows:

County	Number of Representatives
Dade	14
Duval	7
Hillsborough	6
Pinellas	6
Broward	5
Orange	4
Palm Beach	4
Polk	3
Escambia	3
Volusia	2
Brevard	2
Sarasota	1
Leon	1
Alachua	1
Manatee	1

Bay	1
Okaloosa	1
Lake	1
Seminole	1
Lee	1
Marion	1
Monroe	1
Gadsden	1
St. Lucie	1
Pasco	1
Jackson	1
Putnam	1
St. Johns	1
Santa Rosa	1
Indian River	1
Highlands	1
Columbia	1
Clay	1
Osceola	1
Nassau	1
Martin	1
Collier	1
Walton	1
Suwannee	1
Madison	1
Taylor	1
Charlotte	1
Bradford	1
Hardee	1
Sumter	1
DeSoto	1
Washington	1
Hernando	1
Holmes	1
Levy	1
Gulf	1

Jefferson	1
Citrus	1
Hendry	1
Hamilton	1
Calhoun	1
Baker	1
Franklin	1
Okeechobee	1
Union	1
Wakulla	1
Flagler	1
Dixie	1
Liberty	1
Glades	1
Lafayette	1
Gilchrist	1

Section 3. Section 10.04, Florida Statutes, is added to read:

10.04 *Legislative apportionment.* —

(1) The 1963 legislature shall be composed of the legislators elected pursuant to the constitution of 1885, as amended, and of the additional legislators as provided for in sections 10.01 and 10.03, Florida Statutes, as amended at this special session of the legislature. Any representative or senator elected in the 1962 general election pursuant to the constitution of 1885, as amended, shall serve in said office for the term for which he was elected. The terms of office of members of the senate shall be for four (4) years and the terms of office of members of the house of representatives shall be for two (2) years. Any senator now serving shall complete his term to which he was elected; provided that the resignation or death of any legislator